No. 84-1513

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAOLO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether police observation from aircraft of a fenced residential yard is a search under the Fourth Amendment of the United States Constitution.
2. May police reasonably rely on a judicial warrant to seize contraband when probable cause is based on an aerial observation which is fully disclosed to the magistrate but subsequently held unlawful?

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Petitioner, State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, filed on November 20, 1984.

OPINIONS BELOW

The opinion filed by the California Court of Appeal is reported at 161 Cal.App.3d 1081, 208 Cal.Rptr. 93.

JURISDICTION

The judgment of the California Court of Appeal was filed on November 20, 1984. (Appendix A). The People's petition for rehearing was denied on December 10, 1984 (Appendix B). On January 23, 1985, the California Supreme Court denied the People's petition for hearing (Appendix C). By orders filed February 15 and March 14, 1985, the California Court of Appeal stayed its remittitur until March 25, 1985 to permit this petition. (Appendices D, E).

This Court's jurisdiction is invoked under Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV.

STATEMENT OF THE CASE

A. STATE PROCEEDINGS

On August 8, 1983, respondent was charged in the Santa Clara County Superior Court, with feloniously cultivating and selling marijuana (Cal. Health & Saf. Code, §§ 11358, 11360(a)). (CT 50).[1/]

Citing Katz v. United States, 389 U.S. 347 (1967), respondent contended that police aerial observation of his home's fenced yard violated the Fourth Amendment. Respondent moved unsuccessfully in the trial court to suppress the aerial observation, and, as fruit, evidence seized from his yard

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1. "CT" designates the Clerk's Transcript on appeal.

under a search warrant. (CT 25-31, 33-41, 81). Respondent later pled guilty to the cultivation charge (CT 92-93).

Respondent appealed to the California Court of Appeal, First Appellate District. (CT 109). At that court's request, the parties addressed United States v. Leon, 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984). (Appendix A:4).

The California Court of Appeal reversed; holding that the aerial observation was a warrantless search of the curtilage violating the Fourth Amendment, the California court suppressed all evidence. "Leon has no application . . . [A]n unconstitutional search cannot be . . . the basis for . . . a search warrant or the Fourth Amendment would be rendered meaningless," the court held. (Appendix A:6, 8-9; citations and fn. omitted.)

B. FACTS

On September 2, 1982, Santa Clara police narcotics officer Schutz received an anonymous phone message that marijuana was seen growing in the backyard of respondent's residence. (CT 5, 7-8, 11, 14, 36, 37). Officer Schutz was unable to observe the yard from the ground because of a 6-foot outer fence and an inner fence approximately 10-feet high. Officer Schutz was aware that marijuana growers frequently conceal cultivation by elevated fences. (CT 15, 37-38).

Later that day, Schutz chartered an airplane at the San Jose airport to observe and photograph the yard. (CT 11-12, 38). Flying at not less than 1000 feet altitude, and without visual aids, Schutz identified by its distinctive color, then photographed, a 15 by 25 foot marijuana

garden of 8 to 10 feet tall plants within the inner fence. (CT 12-16, 38).

Officer Schutz made ten to twelve observations of houses during the same flight, each based on a report of marijuana cultivation. Five reports were confirmed. Other aircraft, using the San Jose airport, were in the area. (CT 11-12, 15-17).

On September 8, 1982, Schutz obtained a search warrant. His affidavit described in detail the tip, the ground and aerial observations, as well as the plane's altitude and the absence of visual aids for the aerial sighting. (CT 34-40).[2/] The warrant was executed the following day. Seventy-three marijuana plants averaging eight feet

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2. An aerial photograph, attached to the affidavit, depicts an area of homes and streets including respondent's property. (CT 14, 15, 49).

tall were seized from respondent's yard. (CT 6, 17).

REASONS FOR GRANTING THE WRIT

The California Court of Appeal ignores the reasoning in Oliver v. United States, 466 U.S. ___, 80 L.Ed.2d 214, 223-227; 104 S.Ct. 1735, 1740-1743 (1984), regarding reasonable expectations of privacy, to hold that aerial observation of a fenced residential yard is subject to the Fourth Amendment's warrant requirement. This decision conflicts with both federal and state decisions upholding physically unobtrusive aerial observation of areas immediately surrounding a home which were closed to ground view from outside the property. (United States v. Bassford, ___ F.Supp. ___, No. 84-22-B (D. Maine, filed Jan. 28, 1985); Randall v. State, 458 So.2d 822, 824-826 (Fla.App.2 Dist. 1984); State v. Stachler, 570 P.2d 1323, 1326-1329 (Hawaii 1977); State v. Rogers, 673 P.2d 142, 143-144 (N.M.App.

1983). Cf. People v. Sneed, 32 Cal.App.3d 535, 540-543 (1973) [intrusive low altitude]; State v. Knight, 621 P.2d 370, 373 (Hawaii 1980) [following Stachler but rev'd on other grounds].)[3/] This Court should intervene to resolve that conflict.

Law enforcement will be severely hampered by this ruling. Under the decision, marijuana cultivation is entitled to "privacy" within fenced residential yards. Unless police are on routine air patrol - an unprincipled distinction by the California Court which also conflicts with those

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3. Presently before this Court is a case involving visually augmented aerial surveillance of "industrial curtilage". Dow Chemical Co. v. United States, 749 F.2d 307, (6th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3656 (U.S. Feb. 7, 1985) (No. 84-1259). Cf. United States v. Marbury, 732 F.2d 390, 398-399 (5th Cir. 1984) (aerial surveillance of commercial gravel pit upheld.).

decisions - officers must henceforth guess if they are seeing solidly fenced curtilage, open field or a combination. The impracticality of this decision and its adverse impact on California's efforts against marijuana cultivation justify review.

The California Court of Appeal's grudging interpretation of United States v. Leon, supra, 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) merits certiorari standing alone. Under the Court of Appeal's interpretation of Leon, objectively reasonable reliance by police on a judicial warrant to seize property is irrelevant if the warrant is subsequently deemed fruit of an illegal search. (Cf. United States v. Henderson, 746 F.2d 619, 624-625 (9th Cir. 1984) [conflicting in principle].)

Under Leon, police do not act at their peril when they rely in good faith on a judicial warrant to seize property when the magistrate reasonably found probable cause was lawfully acquired. This point has not been lost on the United States Court of Appeals for the District of Columbia Circuit which recently applied Leon on that basis. United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984). Expression of that principle by this Court will ensure Leon's consistent application in the frequently encountered case where probable cause for a warrant is undermined by a reviewing court's subsequent appraisal of earlier police conduct.

ARGUMENT

I

A PHYSICALLY NONINTRUSIVE OBSERVATION OF A READILY SEEN OBJECT IN A FENCED YARD FROM AIRCRAFT IN NAVIGABLE AIRSPACE IS NOT A SEARCH

The California Court of Appeal finds aerial observation by police of marijuana plants in a fenced yard to be "a direct and unauthorized intrusion into . . . the home." (Appendix A:19). Curtilage, closed to ground view, is now fictionally opaque to all California peace officers not on routine air patrol.

The lower court fails to acknowledge that "the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself" was reserved by this Court in

Oliver v. United States, supra, 466 U.S. at ___, 80 L.Ed.2d at 225, fn. 11, 104 S.Ct. at 1742, fn. 11.

Oliver does not say that police may lawfully survey only "open fields" from the air, but refers to "lands". Indeed, the Fourth Amendment has never been extended by this Court to preclude visual observation from public places of readily discernible items on particular premises. (See United States v. Knotts, 460 U.S. 276, 282 (1983).) Airplanes in navigable space, not physically interfering with the enjoyment of property below, occupy such public places. (See United States v. Causby, 328 U.S. 256, 261, 266 (1946).)

The Court of Appeal erroneously concludes that the height and existence of respondent's fence manifests a reasonable expectation of privacy.

Oliver v. United States, supra, 466 U.S. ___, 80 L.Ed.2d at 227; 104 S.Ct. at 1743, however, holds that private fences do not establish an expectation of privacy recognized by society. "Rather the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." (Ibid.)

Society is not prepared to recognize the legitimacy of privacy expectations from physically nonintrusive observation from navigable airspace, when objects, readily observable with the naked eye, are knowingly placed within curtilage open to aerial view. (See United States v. Bassford, supra, slip op. at 6-7, 10-11; State v. Stachler, supra, 570 P.2d at 1328-1329; State v. Rogers, 673 P.2d at 143-144). In such circumstances, "[s]ociety appears willing to accept aerial surveillance as a

reasonable and necessary investigative tool in effective modern law enforcement." (Randall v. State, supra, 458 So.2d at 825.)

Moreover, "[t]here would appear to be no sound basis for distinguishing between 'curtilage' and 'noncurtilage' areas equally visible from the air. In most cases it would be impracticable to view one without contemporaneously viewing the other." (United States v. Bassford, supra, slip op. at 7.)

Under the Court of Appeal's decision, the airborne officer will "have to guess before every search whether landowners had erected fences sufficiently high . . . to establish a right of privacy." (Oliver v. United States, supra, 466 U.S. ___, 80 L.Ed.2d at 226; 104 S.Ct. at 1742-1743.) Police will have to decide if a fence encloses curtilage, open fields or a

combination of both. In many cases, the officer will not know whether he "searched" or only "looked" until he already has seen. The decision provides no meaningful guidance to police.

There is an urgent need to provide such guidance. This decision will severely impair law enforcement efforts to reduce marijuana cultivation in California. This Court's recent decisions illustrate the significant role played by aerial observation in the field. (See e.g., United States v. Knotts, supra, 460 U.S. 276, 279.)[4/]

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4. That role has not gone unnoticed by commentators, (see, Comment, Aerial Surveillance: A Plane View Of the Fourth Amendment, 18 Gonz.L.Rev. 307, 321 (1982-83)) and has provoked much debate (see e.g., Annotation, Aerial Observation or Surveillance As Violative Of Fourth Amendment Guaranty Against Unreasonable Search and Seizure, 56 ALR Fed. 772;

(FOOTNOTE 4 CONTINUED ON NEXT PAGE)

Because the California court's exception for routine patrol observation is unrealistic, its decision will provide safe havens for the California marijuana industry so long as it prunes its plants behind high fences. The critical role played by aerial surveillance in drug enforcement justifies this Court's review.

Confusion is now growing in this area such that a definitive

(FOOTNOTE CONTINUED):

Comment, Fourth Amendment Implications of Warrantless Aerial Surveillance, 17 Val.L.Rev. 309 (1983); Comment, Warrantless Aerial Surveillance: A Constitutional Analysis, 35 Vand.L.Rev. 409 (1982); Note, Aerial Surveillance: Overlooking the Fourth Amendment, 50 Fordham L.Rev. 271 (1981); Comment, Open Air Searches and Enhanced Surveillance in California, 21 Santa Clara L.Rev. 779 (1981); Comment, Police Helicopter Surveillance and Other Aided Observations: The Shrinking Reasonable Expectation of Privacy, 11 Cal.W.L.Rev. 505 (1975); Comment, Police Helicopter Surveillance, 15 Ariz.L.Rev. 145 (1973).)

statement of law is required. Recently, for example, the Federal District Court for the Northern District of California, acting under 42 U.S.C. § 1983, granted a preliminary injunction against state and federal officials overseeing California's Campaign Against Marijuana Planting (CAMP) enjoining, inter alia, use of helicopters for surveillance except of open fields. However, under the terms of the injunction, this prohibition does not apply to fixed wing aircraft. NORML v. Mullen, No. (83-4037 RPA (D.C.N.Cal., 1985) (Order Granting Preliminary Injunction) 33.

When viewed in light of Mullen, the Fourth Amendment's application to aerial observation of curtilage, after Ciraolo, is a puzzle. This Court should intervene so that police flying in navigable airspace in a physically

nonintrusive manner are allowed to see objects openly visible to anyone who looks.

In this case, officers did precisely that. There is no hint of repeated flyovers or other harassment. Police were 1000 feet or higher over a city accustomed to air traffic from a neighboring airport. The marijuana garden, composed of 8 to 10 feet tall plants, was readily distinguishable by its size, the plants' height and their distinctive color. Not readily distinguishable from the air or the ground or the law was the boundary created by the California court separating protected from unprotected areas. The police deserve brighter lines than provided by this decision.

II

EVIDENCE SEIZED IN GOOD FAITH RELIANCE ON A JUDICIAL WARRANT IS ADMISSIBLE WHERE PROBABLE CAUSE IS SUBSEQUENTLY DEEMED A PRODUCT OF AN ILLEGAL SEARCH FULLY DISCLOSED TO THE MAGISTRATE

The California Court of Appeal flouts United States v. Leon, supra, 468 U.S. ___, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) which it deems inapplicable whenever a warrant is based on information that is later ruled illegal.

Leon does not support such an overbroad holding. Evidence seized in good faith reliance on a judicial warrant is admissible when the magistrate reasonably found probable cause was acquired lawfully, notwithstanding a subsequent contrary determination. In United States v. Thornton, supra, 746 F.2d 39, the Court of Appeals was confronted with the claim that a warrantless search of a trash can was

unconstitutional, thus, rendering probable cause for a later search warrant insufficient. The court found it unnecessary to reach the question, under Leon: "It was eminently reasonable for the Superior Court judge [who issued the warrant], and the police officers, to believe that the trash bag search was constitutional" under the "overwhelming weight of authority" upholding such searches. (Id., at 49; fn. omitted).

The California Court of Appeal, however, observes that Leon neither applies to warrantless searches nor overrules the "fruit of the poisonous tree" doctrine. (Appendix A:6). From this truism it discerns another:

> "[A]n unconstitutional search cannot be . . . the basis for . . . a search warrant . . ."

(Appendix A:8; fn. and citations omitted.) It concludes that "Leon does not permit the use of the evidence seized in the instant case." (Appendix A:5).

The conclusion does not follow from its premises. Of course, an illegal search may not "form the basis for an arrest or search warrant or for testimony at the homeowner's trial, since the prosecution would be using the fruits of a Fourth Amendment violation [citations]." Alderman v. United States 394 U.S. 165, 177 (1969). That principle, however, merely establishes a factual predicate to Leon's application here. The warrant has been found

defective, subsequent to its execution, based on an illegal search, according to the California Court of Appeal.

The Fourth Amendment imposes no obligation on police to describe, when seeking a warrant, the precise method by which facts were gathered, so long as probable cause is present. (See Illinois v. Gates, 462 U.S. 213, 238 (1983). When police go further and detail how probable cause was acquired, a magistrate's warrant is an implicit judicial determination that probable cause was obtained constitutionally. If that appraisal is subsequently overturned, when it was reasonable under the law at the time, the officer seizing property under the warrant stands in identical relation to the Fourth Amendment as the officer in Leon. The property is seized by police relying in good faith on a judicial officer's

Fourth Amendment determination which later proves erroneous. Leon compels that the error be ascribed to its legitimate source, the magistrate, and the evidence admitted.5/

The California Court of Appeal believed that Leon was impliedly limited by Segura v. United States, supra, 468 U.S. ___, 82 L.Ed.2d 599, 104 S.Ct. 3380.

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5. Cf., United States v. Henderson, supra, 746 F.2d 619, 624-625 (9th Cir. 1984), where evidence, seized under a search warrant based on results of beeper monitoring, authorized by court order, was held admissible under Leon. The reviewing court assumed that United States v. Karo, 468 U.S. ___, 82 L.Ed.2d 530; 104 S.Ct. 3296 (1984) retroactively invalidated the beeper order, leaving the search warrant affidavit insufficient without the beeper information. Even so, "the search warrant was based on a probable cause determination that comported fully with applicable legal standards at the time," which allowed warrantless beeper monitoring. (746 F.2d at 625). While the existence of the beeper order factually distinguishes Henderson, its rationale conflicts in principle with the California Court of Appeal's holding.

Were a contrary reached, according to the California court, the Fourth Amendment would "be rendered meaningless" by Leon. (Appendix A:7-9; fn. and citations omitted.) We disagree.

Segura held, inter alia, that a prior unlawful search did not invalidate a search warrant based on information acquired independent of the police illegality. Nothing in Segura implies that government conduct, reasonably found constitutional by a magistrate, but subsequently deemed illegal, compels suppression of evidence seized in good faith reliance on a search warrant.

Meaningful deterrence of the prior unlawful police conduct is obtained by excluding direct results of the unconstitutional search. (Segura v. United States, supra, 468 U.S. ___, 82 L.Ed.2d at 608, 104 S.Ct. at 3386.)

Thus, information acquired during the overflight, if illegal, is inadmissible at any trial. The Fourth Amendment, rather than being rendered meaningless, is fully vindicated.

In this case, Officer Schutz described in his affidavit the manner by which the crucial aerial observation was made. The magistrate necessarily concluded, on a legitimate view of the law at the time,[6/] that the overflight complied with the Fourth Amendment. The California Court of Appeal's subsequent decision to the contrary does not

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6. See, e.g., Tuttle v. Superior Court, 120 Cal.App.3d 320, 327 (1981), cert. denied, 454 U.S. 1033 (1981); People v. Joubert, 118 Cal.App.3d 637, 645-646 (1981) (quoting State v. Stachler, supra, 570 P.2d 1323); People v. St. Amour, 104 Cal.App.3d 886, 891-894 (1980); People v. Superior Court (Stroud), 37 Cal.App.3d 836, 839-840 (1974); People v. Sneed, supra, 32 Cal.App.3d at 542-543 (dictum).

preclude reasonable reliance by police on the warrant.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to grant a writ of certiorari to review the judgment and opinion of the California Court of Appeal.

DATED: March 22, 1985

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED

November 20, 1984
Court of Appeal - First App. Dist.
By: Clifford C. Porter, Clerk
Deputy

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. AO26048
v.	)	Santa Clara County Superior Court No. 88043
DANTE CARLO CIRAOLO,	)	
Defendant and Appellant.	)	

Defendant/appellant Dante Carlo Ciraolo appeals his conviction of cultivation of marijuana (Health & Saf. Code, § 11358) following his plea of guilty, contending the trial court erred in failing to suppress the evidence seized during a search of his residence.

The search was conducted pursuant to a warrant obtained on the basis of information gathered in a warrantless overflight of defendant's residence. For reasons hereafter set forth, we conclude the evidence was inadmissible and reverse.

On September 2, 1982, Santa Clara police officer Shutz received an anonymous phone message that marijuana plants were seen growing in the back yard of a Santa Clara home, later identified as defendant's residence. Shutz initially went by the house on foot and conducted a ground level investigation. He was unable to observe anything because of two fences that completely enclosed defendant's back yard: a 6-foot outer fence, and an inner fence approximately 10 feet high. Officer Shutz undertook an airplane flight that same day with the express purpose of observing and photographing that portion of defendant's residence enclosed by his

fence. The plane was flown at an altitude of 1000 feet. Without visual aids, Shutz observed and photographed a marijuana garden in defendant's back yard. On the basis of the information obtained from the overflight, Shutz procured a search warrant for defendant's home, and upon execution thereof, growing marijuana plants were discovered within the fenced area of the back yard and seized.

Defendant's motion under Penal Code section 1538.5 to suppress the plants was denied. He contends the aerial surveillance violated his reasonable expectation of privacy, protected by the Fourth Amendment and various provisions of the California Constitution.[1/] The People contend the

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1/ In light of our decision on Fourth Amendment grounds, we need not reach defendant's remaining contentions.

aerial surveillance was reasonable, citing, inter alia, Oliver v. United States (1984) ___ U.S. ___ [80 L.Ed.2d 214, 104 S.Ct. 1735], United States v. Allen (9th Cir. 1980) 675 F.2d 1373, cert. den. Allen v. United States (1981) 454 U.S 838, and People v. Superior Court (Stroud) (1974) 37 Cal.App.3d 836.

At our request both parties have discussed the applicability of United States v. Leon (1984) ___ U.S. ___ [82 L.Ed.2d 677, 104 S.Ct. 3405]. In Leon, the United States Supreme Court responded affirmatively to the issue of "whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be

unsupported by probable cause." (Id., at p. ___ [82 L.Ed.2d at p. 684, 104 S.Ct. at p. 3409].) "[O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case-in-chief." (Id., at p. ___ [82 L.Ed.2d at p. 692, 104 S.Ct. at p. 3416].) However, we conclude that Leon does not permit the use of the evidence seized in the instant case. "The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment . . . ." (United States v. Leon, supra, ___ U.S. at p. ___ [82 L.Ed.2d at

p. 699, 104 S.Ct. at p. 3422]; emphasis supplied.)

Defendant correctly notes that our primary focus must be directed to the warrantless search conducted during the overflight. Leon has no application to warrantless searches, nor does it overrule the "fruit of the poisonous tree" doctrine which first bloomed in Nardone v. United States (1939) 308 U.S. 338 [84 L.Ed.2d 307, 60 S.Ct. 266], and ripened in Wong Sun v. United States (1963) 371 U.S. 471 [9 L.Ed.2d 441, 83 S.Ct. 407]. This doctrine forbids the use of after-acquired evidence which is found to be the direct result of an unlawful search or other unlawful conduct. Such evidence may be used only if it can be established that it was acquired or discovered by independent means "'. . . sufficiently distinguishable to be purged of the primary taint.' [Citation.]" (Wong Sun v. United States,

supra, at p. 488 [9 L.Ed.2d at p. 455, 83 S.Ct. at p. 417]; see also Taylor v. Alabama (1982) 457 U.S. 687 [73 L.Ed.2d 314, 102 S.Ct. 2664]; Dunaway v. New York (1979) 442 U.S. 200 [60 L.Ed.2d 824, 99 S.Ct. 2248]; Brown v. Illinois (1975) 422 U.S. 590 [45 L.Ed.2d 416, 95 S.Ct. 2254].)

Further confirmation that the Wong Sun doctrine still controls is found in Segura v. United States (1984) ___ U.S. ___ [82 L.Ed.2d 599, 104 S.Ct. 3380] decided the same date as Leon. Segura held that a search of an apartment conducted pursuant to a valid search warrant was not invalidated by a previous illegal entry into the apartment, where the warrant and the information upon which it was based were unrelated to the illegal entry. Segura implicitly recognized that evidence seized pursuant to a warrant based on

facts obtained from a prior unlawful search would be subject to suppression. "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure [citation], but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.' [Citation.] It 'extends as well to the indirect as the direct products' of unconstitutional conduct. Wong Sun v. United States . . . [¶] Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion." (Segura v. United States, supra, ___ U.S. at p. ___ [82 L.Ed.2d at p. 608, 104 S.Ct. at p. 3386].) In short, an unconstitutional search cannot be used as the basis for issuance of a search warrant or the Fourth Amendment would be

rendered meaningless.[2/] Segura v. United States, supra, ___ U.S. at p. ___ [82 L.Ed.2d at p. 608, 104 S.Ct. at p. 3386]; Wong Sun v. United States, supra, at p. 488 [9 L.Ed.2d at p. 455, 83 S.Ct. at p. 417]; McGinnis v. United States (1955) 227 F.2d 598, 603-604.)

We thus refocus our attention on the aerial surveillance of defendant's residence, from which evidence was obtained to support the issuance of the search warrant. "The question to be resolved when it is claimed that evidence subsequently obtained is 'tainted' or is 'fruit' of a prior illegality is whether the challenged evidence was '"come at by exploitation of [the initial] illegality

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2/ Because Leon is limited to searches conducted pursuant to warrant, we need not decide the issue of its possible retroactive application to the instant case.

or instead by means sufficiently distinguishable to be purged of the primary taint."'" (Segura v. United States, supra, ___ U.S. at p. ___ [82 L.Ed.2d at p. 608, 104 S.Ct. at p. 3386], citing Wong Sun v. United States, supra, 371 U.S. at p. 488 [9 L.Ed.2d at p. 455, 83 S.Ct. at p. 417].) It is undisputed that the aerial surveillance provided the sole source the sole source of factual support for the warrant.[3/]

We disagree with the People's contention that the federal courts have condoned aerial surveillance of areas within the curtilage. Oliver v. United States (1984) ___ U.S. ___ [80 L.Ed.2d

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3/ Clearly, the anonymous tip received by Officer Shutz did not, by itself, provide probable cause to support a warrant. (Illinois v. Gates (1983) ___ U.S. ___, [76 L.Ed.2d 527, 548-549, 103 S.Ct. 2317, 2332-2333]; accord People v. Reeves (1964) 61 Cal.2d 268, 273-274.)

214, 104 S.Ct. 1735], upon which the People rely, reaffirmed the "open fields" doctrine of Hester v. United States (1924) 265 U.S. 57 [68 L.Ed.2d 898, 44 S.Ct. 445]. Oliver held the Fourth Amendment did not preclude the use of evidence obtained through a warrantless search of secluded but open fields on private property, even though posted with "no trespassing" signs and secured with a locked gate. The court reasoned that open fields, although secluded, were not within the curtilage, and hence not within an area where one could reasonably entertain an expectation of privacy. However, the court made it clear that the area within the curtilage -- "the land immediately surrounding and associated with the home"[4/] -- was entitled to the "right

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4/ ___ U.S. ___ [80 L.Ed.2d 225, 104 S.Ct. 1742].

to privacy embodied in the Fourth Amendment."[5/] "[T]he rule of Hester v. United States, supra, that we affirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. [Citation.] This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'

5/ ___ U.S. ___ [80 L.Ed.2d 224, 104 S.Ct. 1741].

[Citations.]" (Oliver v. United States, supra, ___ U.S. at p. ___ [80 L.Ed.2d at p. 224, 104 S.Ct. at p. 1741], emphasis supplied.)

The Oliver court deemed its decision to be "consistent with the understanding of the right of privacy expressed in our Fourth Amendment jurisprudence [in] Katz v. United States (1967) 389 U.S. 347 . . . . [T]he touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy'." (Oliver v. United States, supra, ___ U.S. at p. ___[80 L.Ed.2d at p. 223, 104 S.Ct. at p. 1740].)

In Katz v. United States, supra, 389 U.S. 347 [19 L.Ed.2d 576, 88 S.Ct. 507], the high court emphasized that the Fourth Amendment protects people, not places, in holding that a

person making a call from a public telephone booth was protected from electronic eavesdropping in the absence of a warrant supported by probable cause. The court held that the Fourth Amendment's protections extended to situations wherein an individual had what has come to be described as a reasonable expectation of privacy. (Accord, People v. Edwards (1969) 71 Cal.2d 1096.) "[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (Katz v. United States, supra, 389 U.S. at pp. 351-352 [19 L.Ed.2d at p. 582, 88 S.Ct. at p. 511]; accord, Oliver v. United States, supra, ___ U.S. at p. ___ [80 L.Ed.2d at p. 223, 104 S.Ct. at p. 1740].) Oliver contains the statement that "both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air."

(Oliver v. United States, supra, ___ U.S. at p. ___ [80 L.Ed.2d 224, 104 S.Ct. 1741], fn. omitted, emphasis supplied.) For this proposition Oliver footnotes a reference to United States v. Allen (9th Cir. 1980) 675 F.2d 1373, and United States v. DeBacker (W.D. Mich. 1980) 493 F.Supp. 1078. (Oliver, supra, ___ U.S. at p. ___ [80 L.Ed.2d 224 fn. 9, 104 S.Ct. 1741].)

Allen involved the helicopter surveillance of a 200-acre ranch on the Oregon coast. The ranch paralleled the ocean for approximately one mile and was separated from the beach by a narrow strip of federal land. It was subjected to regular Coast Guard helicopter overflights for law enforcement and other reasons. The Ninth Circuit held that any resident of the ranch, undoubtedly aware of the ranch's proximity to the seacoast, the functions

of the Coast Guard and the frequency of its overflights, could not reasonably entertain an expectation of privacy. (United States v. Allen, supra, 675 F.2d at p. 1381.) DeBacker involved a flight over open fields on the defendant's farm. No issue of surveillance within the curtilage was involved, and the court found that the defendant could not have had a reasonable expectation of privacy.

Other federal cases we have discovered which deal with aerial surveillance also distinguish between open areas or fields and the curtilage. (See, e.g., United States v. Marbury (5th Cir. 1984) 732 F.2d 390, which upheld a helicopter flight over "the plainly noncurtilage portions" of a "large commercial gravel pit tract . . . ." (Id., at p. 398.) Consequently, Oliver's reference to aerial surveillance does not remove Fourth Amendment protection from

the curtilage, wherein the landowner may reasonably expect privacy.

Defendant's back yard is within the curtilage; the height and existence of the two fences constitute objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard. "The historical underpinnings of the 'open fields' doctrine also demonstrate that the doctrine is consistent with respect for 'reasonable expectations of privacy.' As Justice Holmes, writing for the Court, observed in Hester, 265 U.S. at 57, the common law distinguished 'open fields' from the 'curtilage,' the land immediately surrounding and associated with the home. [Citation.] The distinction implies that the curtilage . . . warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is

the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' Boyd v. United States, 116 U.S. 616, 630 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. [Citations.]" (Oliver v. United States, supra, ___ U.S. at p. ___ [80 L.Ed.2d at p. 225, 104 S.Ct. at p. 1742].)

From the perspective of defendant's reasonable expectation of privacy we deem it significant that the aerial surveillance of his back yard was not the result of a routine patrol

conducted for any other legitimate law enforcement or public safety objective, but was undertaken ior the specific purpose of observing this particular enclosure within defendant's curtilage.

In short, we are not dealing with the observation of an open corn field which also contains a cannabis crop. We are confronted instead with a direct and unauthorized intrusion into the sanctity of the home.[6/] "[A] person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy regarding the activities occurring there in all circumstances." (United States v. Allen, supra, 675 F.2d at p. 1380.)

6/ "[I]t becomes clear that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." (Katz v. United States, supra, 389 U.S. at p. 353 [19 L.Ed.2d at p. 583, 88 S.Ct. at p. 512].)

Having determined that the area searched was within defendant's curtilage wherein he could reasonably entertain an expectation of privacy, we must conclude that the warrantless overflight constituted an unreasonable search in violation of the Fourth Amendment. The fruits of that unconstitutional search cannot support a warrant.

The judgment is reversed.

_____
HANING, J.

We concur:

_____
LOW, P.J.

_____
KING, J.

People v. Ciraolo
A026048

Trial Court:	Superior Court County of Santa Clara
Trial Judge:	Honorable Marilyn Pestarino Zecher
Counsel for Appellant:	PAMELA H. DUNCAN, Esq. PHILIP H. PENNYPACKER, Esq. 1565 The Alameda San Jose, California 95126
Counsel for Respondent:	JOHN K. VAN DE KAMP State Attorney General EUGENE W. KASTER LAURENCE K. SULLIVAN Deputy State Attorneys General 6000 State Building San Francisco, California 94102

People v. Ciraolo
A026048

APPENDIX B

COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED

December 10, 1984
Court of Appeal - First App. Dist.
By: Clifford C. Porter, Clerk
Deputy

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. AO26048
v.	)	Santa Clara County Superior Court No. 88043
DANTE CARLO CIRAOLO,	)	
Defendant and Appellant.	)	

BY THE COURT:

The Petition for Rehearing filed in the above-entitled cause is hereby denied.

Dated: December 10, 1984

LOW P.J.

APPENDIX C

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

1ST DISTRICT, DIVISION 5, No. A026048

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

DANTE CARLO CIRAOLO

Respondent's petition for hearing DENIED.

Lucas, J., is of the opinion the petition should be granted.

BIRD

CHIEF JUSTICE

SUPREME COURT

FILED

January 23, 1985
Laurence P. Gill, Clerk
Deputy

APPENDIX D

COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED

February 15, 1985
Court of Appeal - First App. Dist.
By: Clifford C. Porter, Clerk
Deputy

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. AO26048
v.	)	Santa Clara County Superior Court No. 88043
DANTE CARLO CIRAOLO,	)	
Defendant and Appellant.	)	

BY THE COURT:

The motion to stay remittitur pending the timely filing of a petition for writ of certiorari in the United States Supreme Court is granted for a period of 30 days from the date of this order.

Dated: February 15, 1985

LOW P.J.

APPENDIX E

COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED
March 14, 1985
Court of Appeal - First App. Dist.
By: Clifford C. Porter, Clerk
Deputy

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. AO26048
Plaintiff and Respondent,	)	Santa Clara County Superior Court No. 88043
v.	)	
DANTE CARLO CIRAOLO,	)	
Defendant and Appellant.	)	

BY THE COURT:

The application to extend stay of remittitur previously granted pending the timely filing of a petition for writ of certiorari in the United States Supreme Court is granted. And said say is hereby extended to and included March 25, 1985.

Dated: March 14, 1985

LOW P.J.

CERTIFICATE OF SERVICE BY MAIL

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Petitioner,	)	No. _____
v.	)	
DANTE CARLO CIRAOLO,	)	
Respondent.	)	

State of California)
) ss.
City and County of San Francisco)

LAURENCE K. SULLIVAN, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

This his business address is 6000 State Building in the City and County of San Francisco, State of California; that on March 22, 1985 true copies of the attached Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District in the above-entitled matter were served on counsel of record by

placing same in envelopes addressed as

follows:

Clerk, United States Supreme Court
1 First Street, N.E.,
Washington, D.C. 20543

Leo Himmelsbach
District Attorney
70 West Hedding Street
5th Floor
San Jose, CA 95110

Clerk, Santa Clara Superior Court
191 N. First Street
San Jose, CA 95113

Phillip H. Pennypacker, Esq.
Conflicts Administrator
190 West Hedding Street, #202
San Jose, CA 95110

Pamela H. Duncan, Esq.
P.O. Box A
300 7th Avenue
Santa Cruz, CA 95062

Clerk of the Court
California Court of Appeal
First Appeliate District
350 McAllister Street
San Francisco, CA 94102

Said envelopes were then sealed

and deposited in the United States mail

at San Francisco, California, with first class postage thereon fully prepaid.

Laurence K. Sullivan

LAURENCE K. SULLIVAN
Deputy Attorney General

Dated: March 22, 1985

JOAN CHICCARELLA
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN FRANCISCO
My commission expires Feb. 8, 1988

Joan Chiccarella

(NOTARY PUBLIC)

Notary Public in and for the State of California, City and County of San Francisco, personally appeared LAURENCE K. SULLIVAN, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.